

DISCUSSION RESPONSE

The Role of Human Rights in the Realm of Arms Transfers

The Example of Germany

LARISSA FURTWENGLER — 27 July, 2016



Elif Askin picked a current, important, and yet rarely discussed issue for her insightful post and offered a compelling perspective on human rights law and arms transfers. By transferring arms to regions where the human rights situation is precarious, Germany risks to contribute to human rights violations, as Elif has highlighted. I will use this opportunity to take up the example of Germany and look at how the human rights situation in the receiving state in practice limits arms transfers and where the shortcomings lay. I will start with a brief overview of the laws on arms

transfers within Germany and continue with the role the human rights situation in the receiving state plays within the laws and more specifically the process of authorisation. In conclusion I submit that while in the case of Germany human rights are part of the laws on arms transfers, without stronger mechanisms to enforce this commitment it is still prone to be marginalized. As long as the currently existing mechanisms operationalizing the due diligence obligation to prevent (as pointed to by Elif in her last paragraph) are not accompanied by the possibility for judicial review the impact of human rights in practice is at risk of coming to nothing.

The general legal framework regarding arms transfers in Germany

The German law on arms transfers is difficult to grasp as it involves many actors, differs depending on the transferred goods, and is in big parts shaped by practice.

According to Art. 26 para. 2 of the Basic Law the power to authorize fabrication, licensing, or transportation of war weapons, is vested in the Federal Government. The Government factually delegated this power to the 'Federal Security Council', a cabinet committee that is not comprised of all Members of Government – which is why doubts have been raised as to the constitutionality of this procedure.

This provision of the Basic Law is also the legal basis for the War Weapons Control Act, which together with the Foreign Trade and Payments Act – applicable not only to war weapons but also dual use items and all other armaments – forms the core of the German legislation on arms transfers. Decisions ought to be made with the 'Political Principles adopted by the Government of the Federal Republic of

Germany for the Export of War Weapons and Other Military Equipment in mind, which will be discussed below.

The special case of arms transfers as military aid or gifts

Transfers like in the case of the Peschmerga are to be subsumed under 'Länderabgabe', which means that they are stemming from the stock of the armed forces and are provided mostly free of charge to other Governments. There are no specific laws guiding this procedure. It was developed over time in practice. Details are vague and information is scarce. Deeper insight is further obscured by the fact that transfers of this nature are often classified due to their foreign policy and security dimension and are therefore only mentioned by way of example in the yearly arms exports report.

If the transport is conducted by the armed forces there is no need for a licence under the War Weapons Control Act but there is still the need for an export licence under the Foreign Trade Act. This is why the 'Political Principles' that will be further discussed hereinafter still apply to such decisions no matter the specific process.

The role of human rights in the decision making process

Germany aims at discharging its human rights obligations by taking into account the human rights practice of the receiving state when deciding over and executing arms transfers of any kind. There are two ways to do this: Through the 'Political Principles Adopted by the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment' on one hand and the 'end-use certificate' on the other hand.

According to the 'Political Principles' the human rights practices of the recipient country play an essential role when deciding over the issuance of a export licence, especially when transferring them to a country that is not EU, NATO, or NATO-equivalent (the latter currently concerns Australia, New Zealand, Switzerland and Japan). But the vague wording leaves much room for interpretation. For example it is to be defined on a case by case basis what reasonable grounds to suspect that the arms are used in the sustained and systematic abuse of human rights that leads to a denial of a licence by principle means.

Furthermore the 'Political Principles' are non-binding, and thus no legal action whatsoever can be brought based on them. A recent motion of the Green Party to include the 'Political Principles' in the War Weapons Control Act and the Foreign Trade Act – which would make them justiciable – did not find a majority in the Bundestag, the German Parliament.

The fact that decisions are not subject to judicial scrutiny is crucial for understanding the divergence of the commitment to human rights in the 'Political Principles' as opposed to the facts: According to a non-official 2014 report, in 62 countries to which Germany exported weapons, the human rights situation is “highly questionable” (p. 56).

This is but one indication that the human rights situation plays a role in the process of weighing the competing interests when deliberating arms transfers – yet it will hardly succeed in outweighing the other interests if the decision cannot at all be called into question and needs not to be explained but only reported on by the Government.

The second possibility in Germany to take the human rights situation in the receiving state into account is via so called

‘end-use certificates’. The control of the whereabouts of the weapons once they are delivered and the purposes they will be used for is governed by the end-use certificate, requiring the receiver of an arms transfer to sign a statement in which it is laid out how and where the arms will be used. While this practice acknowledges that the responsibility of a state does not end after the transfer itself the effectiveness of these statements is disbelieved. Even more so as cases in which German weapons resurfaced in areas of conflict despite end-use certificates were brought to attention. This doubt led to discussions within the Government of reforming the end-use controls and in 2016 this resulted in the introduction of ‘post shipment controls’. These controls allow for on-site controls in the country of destination for all armament. A major problem that might arise is that big parts of the armaments are used by the armed forces or law enforcement of the receiving state and are thus related to national security. Controls that touch upon such matters seem highly unlikely so the feasibility and execution of ‘post shipment controls’ in practice needs to be seen.

No right without a remedy

What can be deduced from the above is that the role of human rights in the process of deciding over arms transfers in Germany is clear – in theory. However I submit that an obligation to take possible human rights violations under advisement that is not accompanied by a remedy puts them at risk of being pushed aside eventually. This goes especially for areas like arms transfers where human rights are competing with security interests and policy considerations. Here in particular does the lack of possibilities to challenge transfer decisions with more than political debate bear the risk that human rights are trivialized.

I concur with Elif that a due diligence obligation to prevent will help to “internalize international human rights norms into the national decision-making process” and therefore further the application of human rights to arms transfer decisions. Nevertheless, as illustrated by the case of Germany, true respect for human rights can only be guaranteed when the modes of operationalization of the due diligence obligation are enforceable by judicial review and the Government can be tied to its commitments.

Whether or not the possibility of judicial review can further the impact of human rights might be observed in a current case in the UK: On June 30th a High Court granted permission to the NGO Campaign Against Arms Trade (CAAT) to take the decision of the Government to supply arms to Saudi-Arabia to judicial review in light of IHRL and IHL violations of Saudi-Arabia and the Saudi led coalition in Yemen.

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